No. 3005.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

H. F. Dangberg Land & Live-stock Company,

Plaintiff in Error,

vs.

H. C. Day and S. A. Foster, Co-Partners, Doing Business Under the Firm Name and Style of Day & Foster,

Defendants in Error.

Supplemental Brief for Defendant in Error Day.

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Supplemental Brief for Defendant in Error Day.

The purpose of this supplemental brief is to make a point overlooked in our main brief. The point is, that the action being one at law and having been tried before the court without a jury (a jury having been expressly waived by stipulation filed with the clerk), and there being special findings of fact, the plaintiff in error is in no position to raise the question of the sufficiency of the evidence to support the findings or the judgment, because at the close of the evidence

there was no request by him "for a ruling thereon, or for a motion for judgment, or for some motion to present to the court the issue of law so involved." (Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782, 127 C. C. A. 332, 9th Cir.) In the case cited the finding was a general one.

The rule that the court will not inquire into the sufficiency of the evidence to support the findings or judgment, unless that action was presented as a matter of law in the court below, results from sections 649, 700 and 1011 of the Revised Statutes, and the rule is the same whether the findings were general or special. In the following cases the findings were special and it was held that the plaintiff in error, not having made a peremptory request or motion before the close of the evidence, was precluded from raising the sufficiency of the evidence in the reviewing court.

Mercantile Trust Co. v. Wood, 60 Fed. 346, 348, C. C. A., 8th Cir.;

Citizens Bank v. Farwell, 63 Fed. 117, C. C. A., 8th Cir.

An excellent statement of the rule will be found in the recent case of Wear v. Imperial Window Glass Co., 224 Fed. 60 (C. C. A., 8th Cir.), where the court said in part:

> "But the case was tried by the court below without a jury, and its decision of that issue is not reviewable in this court. It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the trial court before the close of the trial

It is respectfully submitted, therefore, that the question of the sufficiency of the evidence to support the findings is not open for review in this court; and as the alleged error regarding the admissibility of evidence is not well taken, the judgment should be affirmed.

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that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party. No such request was made in this case, and the specifications of error, therefore, present no question reviewable by this court. When an action at law is tried without a jury by a federal court, and it makes a *general finding, or a special finding of facts,* the act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, "for any error of fact" (Revised Statutes, Sec. 1011 [U. S. Comp. Stat. 1913, Sec. 1672, p. 700]), and a finding of fact contrary to the weight of the evidence is an error of fact.

The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion is made, denied, and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon during the trial. United States Fidelity & Guaranty Co. v. Board of Com'rs., 145 Fed. 144, 150, 151, 76 C. C. A. 114, 120, 121, and cases there cited; Mercantile Trust Co. v. Wood, 60 Fed. 346, 348, 349, 8 C. C. A. 658, 660, 661; Barnard v. Randle, 110 Fed. 906, 909, 49 C. C. A. 177, 180; Barnsdall v. Waltemeyer, 142 Fed. 415, 417, 73 C. C. A. 515, 517; Bell v. Union Pacific R. Co., 194 Fed. 366, 368, 114 C. C. A. 326, 328; Seep v. Ferris-Haggarty Copper Min. Co., 201 Fed. 893, 894, 895, 896, 120 C. C. A. 191, 192, 193, 194; Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782, 784, 127 C. C. A. 332, 334."

224 Fed. 62, 63.

See also, Maryland Cas. Co. v. Anderson, 240 Fed 364 (C.C.A. 9th Cir.)